Supreme Court, U.S.
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No. 96-1257

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

EDWIN WILLIAM BONNELL,

Petitioner,

v.

AMTEX, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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LIST OF PARTIES

Petitioner is Edwin William Bonnell.

Respondent is Amtex, Inc.

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BRIEF OF RESPONDENT IN OPPOSITION

COMES NOW AMTEX, INC., Respondent in the above styled petition for writ of certiorari, and files this Brief in Opposition. Petitioner seeks the reversal of an opinion of the Eleventh Circuit Court of Appeals, affirming a Bankruptcy Court's imposition of Rule 9011 sanctions, its affirmance in the United States District Court, and the United States District Court's imposition of Rule 11 sanctions.

STATEMENT OF JURISDICTION

Petitioner incorrectly cites that this Court has jurisdiction to hear this appeal under 28 U.S.C. 1257. This Court has jurisdiction to hear this appeal under 28 U.S.C. 1254.

STATEMENT OF THE CASE

On or about September 9, 1994, Respondent filed a Postjudgment Motion for Attorney's Fees pursuant to Fed. R. Bank. P. 9011.[1] In its Rule 9011 Motion, Respondent sought fees **related solely to its fees incurred with Petitioner's Bankruptcy.** Respondent sought fees of $16,442.00.

In response to Respondent's Motion, attorney for Petitioner, Richard J. Tuneski, ("Tuneski"), filed a belated Brief, again merely reciting facts from the underlying New York litigation. On November 8, 1994, the Honorable Homer Drake held oral argument on Respondent's Motion for Rule 9011 attorney's fees. During oral argument, Judge Drake admonished Tuneski on no less than two (2) occasions, and threatened Tuneski with contempt of court; all as a direct result of Tuneski's insistence on attempting to "retry the New York case."

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[1] In an unpublished opinion dated May 25, 1995, the Eleventh Circuit Court of Appeals affirmed the United States District Court's grant of Rule 11 sanctions against Tuneski and the Bankruptcy Court's grant of Respondent's Motion for Summary Judgment. *Bonnell v. Amtex, Inc.*, No.: 94-8906. The Eleventh Circuit Court of Appeals also sanctioned Tuneski by ordering his payment of double costs of the appeal. The affirmance of the Motion for Summary Judgment confirmed an original New York Judgment against Petitioner in favor of Respondent in the approximate amount of $364,000.00.

On or about January 4, 1995, the United States Bankruptcy Court granted Respondent's Motion for Attorney's Fees pursuant to Rule 9011 related solely to Petitioner's bankruptcy filing. Judge Drake entered a lengthy Order granting Amtex's Motion and awarding $7,500.00 as partial reimbursement for attorney's fees. Judge Drake stated that although "the Court [was] not one predisposed to issue sanctions upon the occurrence of slight transgressions in judgment," the Court noted "several troubling facts which call for a serious consideration of sanctions."

Judge Drake specified at least seven (7) factors that contributed to the Court's determination that "Tuneski has engaged in conduct in th[e] proceeding for the improper purposes of harassment, causing unnecessary delay, and increasing the costs of litigation."[2] The Bankruptcy Court took no pleasure in issuing sanctions, but found that Tuneski did not have "an unfettered right to file frivolous motions, make misleading arguments, and otherwise hamper and delay the administration of justice."

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[2] "(1) failing to assert any legitimate defenses or colorable arguments while vigorously opposing Amtex's Complaint, particularly in view of Bonnell's admission in the New York state court that he had committed the acts in question; (2) filing a counterclaim against Amtex when no facts existed, or were even alleged to support such a claim; (3) failing to serve and otherwise prosecute third party defendants after seeking and obtaining the permission of this Court to do so; (4) filing certificates of service containing false service dates; (5) preparing and filing Bonnell's affidavit which contained inaccurate and misleading statements; (6) misrepresenting to the Court the status of Bonnell's appeal to the Eleventh Circuit; and, (7) the finding by Judge Shoob in the District Court that Tuneski acted improperly in this case in violation of Fed. R. Civ. P. 11."

Tuneski appealed the imposition of Rule 9011 sanctions to the United States District Court. On November 14, 1995, the District Court found the Bankruptcy Court did not abuse its discretion and affirmed the Rule 9011 sanctions against Tuneski. Judge Shoob again found Tuneski's arguments frivolous. Judge Shoob found Petitioner was not denied his due process rights because he had "every opportunity to present both argument and evidence to the Bankruptcy Court as to why sanctions should not be imposed." The District Court also ordered Tuneski to show cause why additional sanctions under Rule 11 should not be imposed.

On January 25, 1996, the District Court imposed Rule 11 sanctions against Tuneski and awarded $2,364.18 in attorney's fees and costs related to Respondent's attorney's fees and costs incurred on the appeal of the Bankruptcy Court Order. Tuneski again appealed the District Court's Order to the Eleventh Circuit Court of Appeals.

In a second unpublished opinion dated August 13, 1996, the Eleventh Circuit Court of Appeals reaffirmed "the District Court's affirmance of the Bankruptcy Court's imposition of Rule 9011 sanctions, *as well as the District Court's imposition of Rule 11 sanctions. . . .*" (emphasis added). The Eleventh Circuit Court again imposed sanctions in the form of double costs against Tuneski. *Bonnell v. Amtex, Inc.*, No.: 95-9608.

Tuneski filed a third separate appeal to the Eleventh Circuit Court of Appeals on Judge Shoob's imposition of Rule 11 sanctions. In a third unpublished opinion dated January 21, 1997, the Eleventh Circuit Court of Appeals again affirmed the District Court and imposed sanctions in the form of double costs against Tuneski. (Appendix "A"). The Eleventh Circuit also instructed the Clerk to

forward copies of its 96-8313 opinion and its 95-9608 opinion to the Disciplinary Committee of the State Bar of Georgia.

SUMMARY OF ARGUMENTS

The Bankruptcy Court afforded Petitioner's attorney, Tuneski, notice and a hearing on Respondent's Motion for Attorney's Fees pursuant to Rule 9011 of the Bankruptcy Code. The hearing was continued on one occasion, thereby giving Tuneski additional time to prepare his defense of the Motion. The Bankruptcy Court had sufficient evidence of Tuneski's conduct that warranted sanctions under Rule 9011. The Bankruptcy Court had sufficient evidence of Tuneski's conduct to warrant awarded less in fees than Respondent sought.

The District Court did not abuse its discretion in affirming the Bankruptcy Court's award of attorney's fees to Amtex pursuant to Rule 9011. The District Court was obligated to affirm the Bankruptcy Court's findings of fact unless they were clearly erroneous.

The District Court did not abuse its discretion in awarding Rule 11 sanctions to Respondent against Petitioner's counsel, Tuneski. The District Court followed the procedure and mandates of Rule 11 in imposing sanctions against Tuneski.

ARGUMENT

I.

THE BANKRUPTCY COURT PROPERLY IMPOSED SANCTIONS AGAINST TUNESKI PURSUANT TO RULE 9011.

Tuneski's appeal carries a number of fundamental flaws: Tuneski ignores the fact that each Court sanctioned him for conduct in that Court, related solely to that specific proceeding; Tuneski had notice and the opportunity for a hearing on the Rule 9011 sanctions; by signing pleadings, Tuneski made certain representations under Rule 9011 and Rule 11; and, the rationale for Rule 9011 and Rule 11 has not deterred Tuneski from his abusive conduct.

Each of the sanctions imposed against Tuneski, and he has been sanctioned in every Court, resulted from conduct within the given Court in the given proceeding. Each Order was specific in detail about the conduct resulting in sanctions, and where and when that conduct occurred.

Tuneski correctly states that Rule 11 "was designed simply to deter pleadings that are 'frivolous, legally unreasonable, or without factual foundation....'" (Brief, p. 6, citing *Zaldivar v. City of Los Angeles,* 780 F.2d 823 (9th Cir. 1986). Neither Rule 9011 nor Rule 11 have deterred Tuneski from filing frivolous proceedings. Tuneski has marched forward, undaunted by the imposition of sanctions, through the federal appellate process. Tuneski could have stopped his assault on the judicial process at any juncture, but he elected otherwise.

The amount of sanctions should be set at a level to punish and deter future sanctionable conduct. *In re Armwood,* 175 Bankr. 779 (1994). While the sanctionable conduct may have occurred in different courts, unfortun-

ately for Respondent and the legal community, the sanctions have been unsuccessful in punishing and deterring Tuneski's conduct.

Tuneski cited the Fifth and Fourteenth Amendments as his applicable Constitutional Provisions. What Tuneski failed to acknowledge to this Court is that he received notice of the hearing before Judge Drake in the Bankruptcy Court and Tuneski appeared and argued at the hearing. Tuneski also failed to mention the hearing was continued on one occasion. Due process requires notice and the opportunity for a hearing; Tuneski received both from the Bankruptcy Court.

Tuneski filed a belated Brief in Opposition to Respondent's Motion for Rule 9011 Sanctions that simply recited arguments unsuccessfully espoused previously. At the November 8, 1994, hearing on Respondent's Motion for Rule 9011 attorney's fees, Judge Drake threatened Tuneski with contempt of court for Tuneski's insistence on attempting to "retry the New York case." Tuneski had every opportunity to present evidence and argument to Judge Drake. It was Tuneski's inability to utilize his due process rights that contributed to his sanctions, not the Bankruptcy Court's denial of his due process rights.

A Bankruptcy Court is authorized to examine the initial petition and all subsequent pleadings filed in the case in determining whether to impose Rule 9011 sanctions. *In re Whitney Place Partners,* 123 Bankr. 117 (1991), affirmed *McGlamry v. Whitney Apartments,* 147 Bankr. 619. Judge Drake examined the initial petition, the Counterclaim, third party claims, certificates of service, and Petitioner's affidavit. Judge Drake found that "several troubling facts" called for "serious consideration of sanctions."

It is within the Bankruptcy Court's discretion to impose sanctions only against counsel and not the party.

In re Douglas, 141 B.R. 282 (1992). Therefore, the Bankruptcy Court was well within its discretion in sanctioning Tuneski and not Petitioner.

With the underlying Bankruptcy concluded in August 1995 pursuant to the Eleventh Circuit Court of Appeals' initial opinion, Respondent filed a Postjudgment Motion for Attorney's Fees pursuant to Fed. R. Bank. P. 9011 on September 9, 1995. Respondent's Motion for Rule Sanctions was timely. Respondent could not have moved the Bankruptcy Court for Sanctions until the initial Bankruptcy proceeding was concluded, and the conclusion occurred by virtue of an Order from the Eleventh Circuit Court of Appeals.

II.

THE EVIDENCE IN THE RECORD SHOWS THAT THE DISTRICT COURT PROPERLY AFFIRMED THE BANKRUPTCY COURT'S AWARD OF RULE 9011 SANCTIONS.

A District Court is bound by the Bankruptcy Court's findings of fact unless they are clearly erroneous. *Cothran v. U.S.,* 45 Bankr. 836 (N.D. Ga. 1984); *Matter of Crist,* 460 F. Supp. 891 (Ga. 1978); *In Re Terry,* 294 F. Supp. 253 (Ga. 1968).

Tuneski again presents a due process argument in oppositon to the District Court's affirmance of the Bankruptcy Court. On his appeal to the District Court, Petitioner was not entitled to the same due process considerations as in the initial stages.

The Bankruptcy Court Order imposing Rule 9011 sanctions was lengthy and went into factual detail regarding Tuneski's conduct. Judge Drake noted "several troubling facts which call for a serious consideration of sanctions."

The District Court did not abuse its discretion in affirming Judge Drake's Order. The District Court was bound to accept the Bankruptcy Court's findings of fact unless it determined they were clearly erroneous. The District Court previously experienced similar sanctionable conduct from Tuneski when he appealed the original Bankruptcy Court grant of summary judgment.

The District Court did not abuse its discretion in affirming the Bankruptcy Court's imposition of Rule 9011 sanctions. The District Court's review of the Bankruptcy Court Order does not rise to the level sufficient to grant a petition for writ of certiorari under Supreme Court Rule 10.

III.
THE DISTRICT COURT PROPERLY IMPOSED SANCTIONS AGAINST TUNESKI PURSUANT TO RULE 11.

In part, Federal Rule of Civil Procedure 11 states:

(1) **(B) On Court's Initiative.** On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A). Monetary sanctions may be awarded against a represented party for a violation of subdivision (b)(2).

(B). Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) **Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

In the District Court's November 14, 1995, Order affirming the Rule 9011 sanctions, the Court ordered Tuneski "to file a Brief within twenty (20) days of the date of entry of th[e] Order showing cause why the Court should not impose sanctions against him pursuant to Fed. R. Civ. P. 11." The District Court was very specific about Tuneski's sanctionable conduct, and the November 14, 1995, Order satisfies the mandates of Fed. R. Civ. P. 11 (1) (B).

An award of sanctions pursuant to Rule 11 will be set aside only if the District Court abused its discretion. *Fox v. Acadia State Bank,* 937 F.2d 1566 (11th Cir. 1991); Fed. R. Civ. P. 11. The determination of whether Rule 11 has been violated is "very fact-based," and sanctions are "mandatory" when Rule 11 has been violated. *Ross v. City of Waukegan,* 5 F.3d 104 (7th Cir. 1993); Fed. R. Civ. P. 11.

A cursory review of Tuneski's analysis of both the Bankruptcy Court's imposition of sanctions and the District Court's imposition of sanctions shows that Tuneski has no concept of legal analysis. Tuneski incorrectly states Petitioner's Counterclaim in the Adversary Pro-

ceeding in Bankruptcy Court "was filed against Colin Offenhartz and not Amtex, Inc." (Petitioner's Brief, p. 12). Colin Offenhartz was not the Plaintiff in the underlying Adversary Proceeding; it was Respondent, Amtex, Inc. Tuneski's failure to follow the basic precepts of civil procedure resulted in the imposition of sanctions.

Tuneski's signature on pleadings constitutes certain representations to the Court. Fed. R. Civ. P. 11(b). The District Court and the Bankruptcy Court found Tuneski's representations false.

Tuneski's conduct violated Rule 11. Once the District Court found a violation of Rule 11, it was required to impose sanctions and those sanctions should not be overturned. *Didie v. Howes,* 988 F.2d 1097 (11th Cir. 1993); *In re Whitney Place Partners,* 123 Bankr. 117 (1991), affirmed *McGlamry v. Whitney Apartments,* 147 Bankr. 619. Rule 11 was enacted to deter such dilatory or abusive pretrial tactics, and the District Court's sanctions should be upheld. *Golden Eagle Distributing Corp. v. Burroughs Corp.,* 801 F.2d 584 (9th Cir. 1986). The District Court examined Respondent's counsel's Affidavits, found the fees and costs reasonable, and imposed sanctions.

The District Court timely served its show cause Order. The District Court *sua sponte* can impose Rule 11 sanctions, and the District Court followed the requirements of Rule 11. The District Court gave Tuneski the opportunity to show cause why Rule 11 sanctions should not be imposed; Tuneski presented nothing.

The District Court did not abuse its discretion in awarding Rule 11 sanctions in favor of Respondent and against Tuneski. Just as with Tuneski's last appeal, the

District Court took careful heed of his Brief and could not "discern any issues that appear to be warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." *See* Fed. R. Civ. P. 11(b)(2).

The District Court did not make any erroneous factual findings or misapply Rule 11. Tuneski's appeal to this Court is a further attempt to bludgeon Respondent with abusive tactics. The petition for writ of certiorari should not be granted.

CONCLUSION

This Court should deny Petitioner's petition for writ of certiorari; in doing so, it would send a message from the highest Court in this land that such conduct will not be tolerated.

This 13th day of March, 1997.

Respectfully submitted,

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APPENDIX A

[Filed JAN 21 1997]

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8313
Non-Argument Calendar

D.C. Docket No. 1:95-CV-0481-MHS
BK No. 91-AD-96681

IN RE:

EDWIN WILLIAM BONNELL,

Debtor.

EDWIN WILLIAM BONNELL,

Plaintiff-Appellant,

versus

AMTEX, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(January 21, 1997)

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

This is the third time we have considered in this court matters related to sanctions imposed against appellant Edward William Bonnell's attorney, Richard J. Tuneski ("Tuneski"). In an unpublished opinion filed on May 25, 1995, we affirmed the district court's grant of Rule 11 sanctions against Tuneski and the bankruptcy court's grant of appellee Amtex's ("Amtex") motion for summary judgment. We also sanctioned Tuneski and ordered the payment of double the amount of Amtex's costs of the appeal.

In a second unpublished opinion filed on August 13, 1996, we affirmed the district court's affirmance of the bankruptcy court's imposition of Rule 9011 sanctions as well as the district court's imposition of Rule 11 sanctions. For a second time we imposed sanctions in the form of double costs against Tuneski.

In the present case, it appears from the record that Tuneski has filed a separate appeal of the district court's judgment on the Rule 11 sanctions which has already been addressed and affirmed by this court. See *Bonnell v. Amtex, Inc.*, No. 95-9608 (11th Cir. August 13, 1996). We reaffirm the district court's judgment finding Tuneski's conduct sanctionable. Moreover, we again direct the clerk of this court to tax double costs against Tuneski for prosecuting this yet another frivolous appeal. We further direct the clerk to send a copy of this opinion, as well as our previous opinion, entered in No. 95-9608, to the Disciplinary Committee of the State Bar of Georgia.

AFFIRMED.

APPENDIX B

[Filed JAN 21 1997]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8313
Non-Argument Calendar
District Court Docket No. 1:95-CV-0481

IN RE:

EDWIN WILLIAM BONNELL,

Debtor.

EDWIN WILLIAM BONNELL,

Plaintiff-Appellant,

versus

AMEX, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the

Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that attorney, Richard J. Tuneski, pay to defendant-appellee, double costs on appeal to be taxed by the Clerk of this Court.

Entered: January 21, 1997
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Dander
Deputy Clerk

ISSUED AS MANDATE: 2/21/97